Supreme Court, U.S.
FILED
SEP 26 2002
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(2)

No. 02-297

IN THE

Supreme Court of the United States

SHANNON T. DOYLE,
Petitioner,

v.

HYDRO NUCLEAR SERVICES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF *AMICI CURIAE* OF NORTHWEST ENVIRONMENTAL ADVOCATES IN SUPPORT OF PETITIONER

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

22 pp

QUESTIONS PRESENTED

In this case, the Secretary of Labor interpreted Section 210 of the Energy Reorganization Act of 1974 ("ERA"), as amended, 92 Stat. 2947 (1978), 42 U.S.C. § 5851(a), finding that Petitioner's "protected activity" includes his refusal to sign a pre-employment agreement, which he reasonably believed forced him to prospectively waive his statutory rights. In the decision below, a divided panel of the United States Court of Appeals for the Third Circuit afforded the Secretary's determination no deference and ratified the employer's use of a waiver of statutory rights as a condition of employment. This case therefore presents the following questions:

1. Whether an employee may be required to prospectively waive substantive rights under the ERA as a condition of employment;

2. Whether the legality of a prospective waiver should be judged from the point of view of a reasonable employee; and

3. Whether the Secretary of Labor's determination, that an employee's refusal to sign a prospective waiver of substantive rights amounts to "protected activity" under the ERA, is entitled to *Chevron*-type deference.

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STATEMENT OF INTEREST

A. The *amici.*

Northwest Environmental Advocates [1] is a private non-profit organization. For over 30 years, it has worked through advocacy and education to protect and restore water and air

[1] The *amici* submit this brief with the consent of the parties, including the petitioner Shannon Doyle, respondent Hydro Nuclear Services, and the Solicitor General of the United States. The original consents are filed with the Court. Pursuant to Rule 37.6, counsel states that no party to this proceeding, nor any counsel for any party, authored any part of this brief. Moreover, the full costs for the preparation and submission of this brief were paid by the *amici curiae*, or their counsel.

quality, wetlands, and wildlife habitat and to stimulate the development of renewable energy sources to replace fossil and nuclear fuels in the Pacific Northwest. The Northwest Environmental Advocates depends on whistleblowers to discover environmental threats.

The Government Accountability Project (GAP) is a non-profit nonpartisan public interest law firm whose mission is to provide support for whistleblowers. Whistleblowers are employees who exercise free speech rights to challenge institutional abuses of power that betray the public trust. GAP has lead the successful outside campaigns for passage of the Whistleblower Protection Act of 1989 for federal employees, numerous state and local whistleblower statutes, the Military Whistleblower Protection Act for armed services members, and corporate whistleblower laws ranging from the nuclear weapons and power industry to the airline industry. This summer GAP lead the outside campaign for comprehensive whistleblower protection in the Public Company Accounting Reform and Investor Protection Act of 2002. GAP has participated either as counsel or *amicus* in all major cases interpreting federal whistleblower statutes.

The Nuclear Information and Resource Service (NIRS) is the information and networking center for citizens and environmental organizations concerned about nuclear power, radioactive waste, radiation, and sustainable energy issues. NIRS investigates and exposes safety problems at nuclear reactors, monitors every reactor in the U.S. and, to the extent possible, in Eastern Europe, closely watches nuclear regulators and intervenes in policy issues whenever necessary, and provides technical assistance to organizations across the world. Information provided by whistleblowers within nuclear industries, such as Shannon Doyle, are a necessary source of information about safety and compliance issues. Accordingly, any employer attempting to identify or discriminate against whistleblowers undermines the work of NIRS.

Furthermore, NIRS depends on the law of the United States to set an example for other nations on the standards for nuclear safety and employee protections.

The Northwest Environmental Defense Center (NEDC) is an independent non-profit organization that has been working since 1969 to protect the environment and natural resources of the Pacific Northwest. NEDC is located in Portland, Oregon on the campus of Northwestern School of Law of Lewis and Clark College. It provides legal support to individuals and organizations with environmental concerns, and engages in litigation independently or in conjunction with other environmental groups. NEDC also provides valuable hands-on experience for students seeking to enhance their education in environmental law.

The Southern Appalachian Biodiversity Project is a non-profit regional organization dedicated to the native biodiversity of the Southeast. Since 1990, SABP has taken legal action to protect critical habitats and assure full enforcement of conservation laws on public lands. SABP publishes *Wild Mountain Times* to serve as a voice for conservation of Southern Appalachia. As part of its mission to protect public lands, SABP is concerned about timber theft from national forests. Such theft is hard to detect or track. Whistleblowers are essential to discover such thefts and identify the perpetrators. SABP relies on whistleblower protections to prevent the abuse of national forests and the people who can conserve them.

The Strategic Counsel on Corporate Accountability is a legal consulting firm established in 1998 to advise unions, environmental organizations, citizens groups and investors aspiring for corporate responsibility and accountability. Clients seek assessments of firms in the health care, energy, communications, mineral extraction and manufacturing sec-

tors. The ability of employers to require a waiver of whistleblower rights could frustrate accountability for environmental, safety and civil rights abuses. The firm has identified corporate breaches of the duty to disclose environmental and human rights issues of material interest to investors. The newly enacted 18 U.S.C. § 1514A protects employees from retaliation for certain activities in the enforcement of securities law. Therefore, the Counsel has particular concern for the potential to undermine a whistleblower's right to seek new employment without losing or even disclosing whistleblower claims against former employers. Such protections are urgently needed to improve corporate responsibility on Wall Street. If the decision below stands, it would deter workers from reporting securities law violations.

The Tri-State Environmental Council (TSEC) was formed in January 1991 to eradicate social and environmental injustice. It is a non-profit grassroots citizen's organization with activities in Ohio, Pennsylvania and West Virginia. Currently, TSEC is monitoring the operation of Waste Technologies Industries (WTI), one of the largest commercial hazardous waste incinerators. WTI is sited in an impoverished minority neighborhood in East Liverpool, Ohio. TSEC educates the public about WTI, and the enforcement opportunities of the state regulatory agency. It collects information on the day-to-day operation of WTI and other noxious facilities and checks their compliance with government-issued permits. It then monitors enforcement by the regulatory agencies. Accurate primary source information enables the public to make more informed decisions about the facilities that will directly impact human health and the environment. Whistleblowers help by bringing violations to light that may have gone unreported by the employer. Whistleblowers help keep their employers honest, which in turn makes for a healthier relationship with the community. TSEC is concerned about the deterrent effect of the decision below. To the extent that potential whistleblowers are

worried about retaliation and their future career, the flow of information to the public will suffer. If the opinion below stands, employers will strip whistleblowers of their legal protection against discrimination and retaliation. Employers would correctly feel that they are less accountable, and that the courts would be on their side. Area citizens will not have the full record as they seek accountability from area businesses and environmental enforcement authorities.

The Whistleblower Society of America is dedicated to protecting the rights of free expression and association as exercised by whistleblowers. The Society is particularly concerned about impediments that prevent whistleblowers from obtaining their legal protections. By offering support to whistleblowers, the Society hopes those individuals with knowledge of health and safety dangers will have the courage to come forward and report. It is the mission of this Society to protect whistleblowers from any form of retaliation or discrimination that may silence them. The waiver Hydro presented to Doyle in this case is precisely the type of impediment and discrimination that can silence whistleblowers. The Society believes that our nation has a moral obligation to stand beside the individual who comes forward and discloses a danger of lethal radiation. When our government fails such an individual, it fails us all. The Whistleblower Society of America therefore urges the Supreme Court of the United States to hear this case.

Montana-CHEER (Coalition for Health, Environmental & Economic Rights) is a coalition of citizen groups seeking to reduce pollution in western Montana, promote healthy communities, and advocate for safe work places. The coalition needs employees to speak up when they learn about unlawful pollution through their work. When employers use a waiver of rights form, those employees would be chilled.

B. Use of a pre-employment waiver chills employees from engaging in protected activities.

One of the most frustrating experiences for an environmental attorney is to call a prospective witness and hear, "I can't afford to lose my job." While Congress might pass any number of laws to protect employees from discrimination and retaliation, or to protect the environment, public health and safety, or the public coffers from fraudulent claims, these rights are of little use in cases where every prospective witness is afraid of making the boss mad. Ironically, where employers have acted most outrageously to punish employees who speak truth to power, the fear of retribution is at its highest.

By counseling clients, undertaking representation, and preparing cases for trial, environmental lawyers give life to those laws enacted to accomplish public policies. The primary purpose of our system of public trials is to ascertain the truth. Environmental lawyers are frustrated in this primary purpose every time a prospective witness refuses to say what the eyes have seen or the ears have heard. The public policy is frustrated when legal protections fail to give confidence to prospective witnesses about their future economic security.

As today's employment market becomes increasingly mobile, a prospective witness's economic security depends less on the good will of the present employer, and more on that individual's ability to retain new employment in the marketplace. In this context, the decision of the Third Circuit below is particularly distressing to environmental lawyers. The Circuit Court opinion provides a blueprint to all employers who want to frustrate legal claims by employees. According to the decision below, employers face no liability for testing prospective employees on their willingness to abandon legal claims of retaliation against their past

employers. To justify this result, the Third Circuit imputes to prospective employees knowledge that courts would not enforce the release.

Who would be concerned about signing such a release? Only those employees who blew the whistle on a former employer would now fear the equivalent of a black list—a negative reference resulting from the employee's past participation in proceedings to enforce the law. The opinion below sanctions the equivalent of a photograph requirement on employment applications. While an employer can readily tell an applicant's skin color from the photograph, a device such as the pre-employment release is required to identify those employees who care more about the law than about protecting their supervisors from accountability. Already, at least one human resources organization is promoting the Third Circuit opinion, and touting the exact language of the release it approves.[2]

At stake is the ability of every trial lawyer to prepare any type of case that depends on the openness and veracity of employee witnesses. Can employers use the pre-employment release as a sword of Damocles to deter all employees from asserting their legal rights, or testifying truthfully about employer misconduct? To answer this question, the *amici* urge this Court to grant the petition for writ of certiorari of Shannon Doyle.

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[2] See http://www.hrcomply.com/newsletter/040302/10.html.

ARGUMENT

I. AN EMPLOYER'S REQUIREMENT THAT A PROSPECTIVE EMPLOYEE SIGN A RELEASE OF CLAIMS ARISING FROM PROTECTED ACTIVITY, CONSTITUTES UNLAWFUL DISCRIMINATION IN VIOLATION OF THE ENERGY REORGANIZATION ACT OF 1974, 42 U.S.C. § 5851.

A. Whether or not a pre-employment release is enforceable as a contract is immaterial to the question of whether its use constitutes unlawful discrimination against whistleblowers.

Doyle's claim arises under 42 U.S.C. § 5851(a). Through this section, the Energy Reorganization Act (ERA) provides that no employer may discharge or otherwise "discriminate against any employee with respect to his compensation, terms, conditions or privileges of employment because the employee" engaged in any of the activities protected under the Act. The ERA protects not only reporting alleged nuclear safety violations, but also refusing to engage in any practice made unlawful by the ERA. It is through this law that our federal government protects those employees who place lawful operation of nuclear facilities above the happiness of their individual supervisors.

The employee protection provision of the ERA is comparable to those in seven other federal environmental laws.[3]

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[3] The eight federal environmental laws with employee protections are the Water Pollution Control Act (WPCA, commonly called the Clear Water Act), 33 U.S.C. 1367; Safe Drinking Water Act (SDWA), 42 U.S.C. 300j-9(i); Toxic Substances Control Act (TSCA), 15 U.S.C. 2622; Solid Waste Disposal Act (SWDA, also called RCRA), 42 U.S.C. § 6971; Clear Air Act, 42 U.S.C. § 7622; Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or "Superfund Law") , 42 U.S.C. § 9610; the Energy Reorganization Act of

Each of them depends on the employee protections to accomplish their primary enforcement purposes. See *Passaic Valley Sewerage v. United States Dept. of Labor*, 992 F.2d 474, 478 (3d Cir. 1993) ("Such 'whistle-blower' provisions are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes protecting the environment . . . .").

It is hard to imagine any law that is more important to public health and safety. Sixth Circuit Judge George Edwards, Jr., wrote that the intent in passing the ERA was to "encourage employees" to report "unsafe practices in one of the most dangerous technologies mankind has ever invented." *Rose v. Secretary of Department of Labor* (6th Cir. 1986), 800 F.2d 563, 565 (J. Edwards concurring). He explains:

> If employees are coerced and intimidated into remaining silent when they should speak out, the result can be catastrophic. Recent events here and around the world underscore the realization that such complicated and dangerous technology can never be safe without constant human vigilance. The employee protection provision involved in this case thus serves the dual function of protecting both employees and the public from dangerous radioactive substances.

As this case hinges on application of a statute, a careful look at the wording of that statute is necessary to discern its purpose and scope. The key word in this provision of the ERA is the word "discriminate." To "discriminate" means, "to make a clear distinction; distinguish; differentiate; or (2) to act on the basis of prejudice." This is what an employer does when it uses a pre-employment release. For the employer's chilling effect, the contractual enforceability of the

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1974 (ERA), 42 U.S.C. § 5851; and the Surface Transportation Act (STA), 49 U.S.C. § 31105.

release is of no consequence. It is a test of submission, a loyalty oath, a way to distinguish those who will freely abandon rights guaranteed by public policy in favor of unfettering the employer's power over them.

The Circuit Court below incorrectly analyzed this case by asking the question of whether Doyle's refusal to sign the pre-employment release was "protected activity." A proper preliminary question is whether the employer's use of the pre-employment release constituted discrimination. The answer to that question is clearly yes. By presenting the pre-employment release, the employer effectively separated applicants into two groups: (1) those who freely abandon their employment rights; and (2) those who are concerned about the law. By clarifying which applicants have no concern about such a release, and which applicants balk, the release becomes a yellow star marking those whose career is destined for elimination. It is the initial act of distinguishing, of making clear which side the applicant is on, that the ERA prohibits.

Indeed, it is incorrect to say that a prima facie case of retaliation requires a showing of protected activity at all. An employer subjected to a law enforcement investigation might mistakenly retaliate against an employee who engaged in no protected activity. That employee is still protected from "discrimination" on account of identification, albeit mistaken, as a whistleblower. *Reich v. Hoy Shoe, Inc.*, 32 F.3d 361, 368 (8th Cir. 1994); *Brock v. Richardson*, 812 F.2d 121, 123-25 (3d Cir. 1987).

The analysis of whether any such release is enforceable under principals of contract law is wholly immaterial to the issue at hand: does an employer "discriminate" by asking a prospective applicant to sign any document repudiating statutory claims against prior employers?

B. The decision of the Secretary of Labor is entitled to deference as it arises within the scope of authority conferred on the Secretary.

It is well established that agencies charged with enforcing a specific law are entitled to deference toward their interpretations of that law. Accordingly, we pay deference to the Secretary of Labor in construing the statutes she is charged with administering. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984). The Third Circuit adds that "we owe no deference to an erroneous conclusion of law[.]" *Doyle v. Secretary of Labor*, 285 F.3d 243 (3d Cir. 2002), at A17 of Doyle's petition, citing *Williams v. Metzler*, 132 F.3d 937, 946 (3d Cir. 1997). The Court below states both holdings as if it has discretion about which to apply. Review on certiorari can assist the courts below, and practitioners, in drawing the line between questions on which agencies are entitled to deference, and questions on which the court's legal analysis is superior. This Court may appropriately explain that on matters central to the law administered by the agency, and for which Congress has not specifically directed a contrary holding, the agency is entitled to deference.

The Third Circuit honed on the question of whether Doyle's refusal to sign the pre-employment release constituted "protected activity." There can be no question more central to the administration of 42 U.S.C. § 5851(a) than the question of what activity is protected. It is this provision's reason for being—to protect activity by employees that assists in enforcement of the law.

Identifying what employee actions are "protected activities" is at the core of the Secretary's administrative responsibilities for enforcing the whistleblower laws. The Secretary's offices have the experience in this field from

which the workability of the Secretary's interpretation is best determined. The Secretary's interpretation is, therefore, entitled to deference.

C. Doyle's action of refusing to engage in unlawful conduct is protected activity.

The ERA provides explicitly in 42 U.S.C. § 5851(a) that a refusal to engage in conduct that is unlawful under the ERA is protected activity.[4] As the ERA prohibits unlawful discrimination against whistleblowers, then refusing to cooperate with such discrimination is, itself, protected activity. Employers will complain that this is a circular and self-serving argument. However, the refusal to cooperate in discrimination can be the most effective deterrent. To continue the yellow star analogy, when Danish people of all faiths wore yellow stars, they effectively prevented Nazi discrimination against Jewish people. When workers refuse to disclose who blew the whistle, their activity protects those who enforced the law. For any employer who seeks to evade the law through cover-up, a worker's refusal to participate in retaliation is as effective as a loud whistle in revealing who would not lie on request.

D. Hydro's pre-employment release did unlawfully seek a release of Doyle's claims under the ERA.

The release at issue asked Doyle to:

> release and discharge Hydro Nuclear Services, their representatives, and their clients for whom the investigation is being performed and any organization listed above furnishing or receiving any information pertaining to me

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[4]"Protected activity" under the Civil Rights Act of 1964 includes a refusal to engage in unlawful discrimination or retaliation. *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1013 (9th Cir. 1983).

> *from any and all liability or claim* as results [sic] of furnishing or receiving such information pursuant to this authorization. [Emphasis added.]

The Third Circuit majority opinion described this clause:

> Yet the release said nothing about waiving liability for illegal blacklisting. It merely released the enumerated organizations from liability as a "result[] of furnishing or receiving such information pursuant to this authorization." This limited purpose was consistent with the authorization's provision waiving rights to privacy in its first paragraph. Furthermore, the third paragraph of the authorization confirms the limited purpose of the release by authorizing Hydro to use the information for the enumerated purposes ("evaluation" and "eligibility for clearance") without suggesting that an employment applicant released Hydro from liability under the ERA if it made an unlawful employment determination. *The release simply did not purport to waive liability for Hydro's employment decisions or other claims Doyle might make under the ERA after Hydro received information pursuant to the authorization.* It merely released potential claims for privacy infringement. [Emphasis added.]

The release asked Doyle to say that he was releasing Hydro and the providers of information "from any and all liability or claim . . . ." It is a mystery how the decision below can say that this release "*did not purport to waive liability for Hydro's employment decisions or other claims Doyle might make under the ERA* . . . ." In the future, when courts decide they must reverse an agency decision on grounds that it was incorrect as a matter of law, we might hope that the court is correct in its reading of the applicable document. The document itself is not "facially neutral" if it requires a waiver of protected rights, along with all other rights and claims. It is overbroad to the point that it includes an unlawful provision—a requirement that the applicant waive rights protected by the ERA. Indeed, the ERA prohibits the

employer from even knowing that such applicant engaged in protected activity. The use of an overbroad release is unlawful precisely because it requires applicants to identify themselves if they have any interest in preserving their rights based on past protected activities.

The opinion below argues that the Secretary should not construe the release to be unlawful if it was capable of a lawful interpretation.[5] The court rewarded the employer for writing a release that would make whistleblowers identify themselves, yet be sufficiently vague to escape liability. The court below has turned upside-down the ancient maxim that ambiguity is construed against the drafter.[6]

The release at issue has no relevant ambiguity. On its face, it gives the employment applicant notice that this employer expects a level of subservience that would lead the applicant to waive his or her rights against all past employers. This alone is sufficient to trigger the protections of the ERA. Without such protections, employees everywhere must more seriously ponder the effect on their career if they ever dare speak a discouraging word.

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[5] The majority opinion, in a footnote, added that, "we do not find the release to be ambiguous."

[6] Ambiguities in contracts are construed against the drafter of the contract, as set forth in the Restatement (Second) of Contracts, Section 206. A latent ambiguity will be construed against the drafter if the nondrafter's interpretation is reasonable. *Hills Materials Co. v. Rice*, 982 F.2d 514, 516 (Fed. Cir. 1992), citing *Fort Vancouver Plywood Co. v. United States*, 860 F.2d 409, 414 (Fed. Cir. 1988). See also, *Regents of the University of Michigan v. Employees of Agency Rent-A-Car Hospital Association and Agency Rent-A-Car Employees Health Care Plan*, 122 F.3d 336 (6th Cir. 1997).

E. The employer's proffered reason for seeking the pre-employment release is not legitimate.

The majority opinion below advanced a second independent reason for vacating the Secretary's decision. The court held that an employer has a legitimate interest "to ensure power plant integrity and compliance with the governing regulatory framework by hiring only carefully screened temporary employees . . . ." The court below has ignored the effect of the ERA in limiting what information an employer may "legitimately" have and which it may not. While nuclear safety employees must be screened for their training,[7] abilities and experience, they may not lawfully be screened on their past protected activity.

The court below assumed that the existence of a regulatory structure for security clearances means that the employer has a legitimate interest in any and all information about the applicant. This assumption is not fully considered. Obviously, the prospective employer still has no need to ask about the applicant's race, for example. Equally so, the employer has no lawful right to ask the applicant or others about the applicant's past protected activities.

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[7] As noted by Judge Bright in his dissent below:

> Hydro did not need the waiver of liability to get the information it required about Mr. Doyle. The screening procedures of the American National Standard on Security for Nuclear Power Plants (ANSI) indicate that all the background information necessary to meet the ANSI standard can be obtained through a simple release; there is nothing in the standard or screening requirements that requires a waiver of liability. The Secretary makes this point forcefully: "Respondent has not offered any reason why the background information it needs to conduct the screening under the ANSI standard cannot be obtained with a release which does not include a waiver of liability." JA at 21.

The employer's proffered explanation, therefore, is not legitimate. The waiver is not lawful if it seeks information about protected activities.

CONCLUSION

The court below identified the applicable body of law by stating, "we will not distinguish ERA actions from claims arising under analogous anti-retaliation statutes." Indeed, a unified body of law interpreting anti-retaliation statutes can serve a variety of public interests. Why should those who reveal unlawful race discrimination need to consult a different body of law than is used by nuclear whistleblowers, or truck drivers who honestly log their driving and sleep time, or claimants for overtime, or persons who report a fraud on the federal government? Those who would courageously challenge entrenched powers on grounds that are protected by law and public policy deserve a consistent body of law.[8]

The decision below, therefore, is a danger not just to nuclear safety, but also to any statutory program that depends

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[8]This Court has similarly adopted a unified body of law for the award of attorney fees pursuant to the wide variety of laws that provide for such awards to assure private enforcement of public policy. *Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1983); *Blum v. Stenson*, 465 U.S. 886, 888 (1984). Congress is using the model of the federal environmental laws as a pattern for other employee protections. For example, employees who assist in enforcement of aviation safety laws now have a remedy under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121. Employees reporting fraud within publicly traded companies are protected under the Public Company Accounting Reform and Investor Protection Act of 2002, 18 U.S.C. § 1514A.

on employee witnesses for its enforcement. It is a danger to our system of trial justice. The *amici* urge this Court to grant the petition and issue the writ of *certiorari*.

Respectfully submitted,

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